

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of:)	
)	
Paxson Boston License, Inc. v. RCN-BecoCom, LLC)	CSR-5651-M
)	
Request for Mandatory Carriage of WPXB TV, Merrimack, New Hampshire)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 2003

Released: January 23, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Paxson Boston License, Inc. ("Paxson"), licensee of television broadcast station WPXB TV, (Channel 60) Merrimack, New Hampshire ("WPXB") filed, on February 9, 2001, the above-captioned must carry complaint against RCN-BecoCom, LLC ("RCN") for failing to carry WPXB on its cable systems serving Boston, Massachusetts and the surrounding communities. Thereafter, the parties filed two motions requesting additional time for RCN to file its answer to the complaint. This additional time was to allow for further investigation and possible resolution of the complaint. On April 3, 2002 Paxson filed a Status Report and Notification of Resumption of Pleading Cycle. RCN filed an answer to which Paxson replied. For the reasons discussed below, we grant WPXB's must carry complaint.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.¹ A station's market for this purpose is its "designated market area" or DMA, as defined by Nielsen Media Research.² A DMA is a geographic market designation that defines each television market exclusive of

¹ 8 FCC Rcd 2965, 2976-2977 (1993).

² Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. §76.55(e).

others, based on measured viewing patterns.

II. DISCUSSION

3. Paxson states that it requested carriage of WPXB on cable systems operated by RCN on November 13, 2000.³ RCN responded that WPXB's signal quality was insufficient to qualify for must-carry status on RCN's Boston, Massachusetts cable system, based on tests conducted at RCN's headend.⁴ Paxson asserts that WPXB does qualify for carriage because the cable community and the station are located within the same DMA⁵ and because even if the station does not currently deliver a good quality signal to the system's principal headend, Paxson agrees to be responsible for the costs to do so.⁶

4. After the complaint was filed, the parties filed two requests for extension of time for RCN to file its answer.⁷ On April 3, 2002 Paxson requested resumption of the pleading cycle and RCN filed its answer to Paxson's complaint. First, RCN states that the results of its tests indicate that WPXB's signal is inadequate to qualify for carriage and that during the past year when this proceeding was in abeyance, Paxson took no steps to deliver a quality signal.⁸ RCN states that it directed its employees to cooperate with Paxson but that nothing was accomplished. RCN also asserts that Paxson failed to meet its burden to provide an adequate signal and that this failure forced both RCN and the Commission to expend further time, expense, and resources in litigating this complaint. RCN requests that the Commission order Paxson to bear the costs of preparing RCN's answer and urges the Commission to deny the complaint pursuant to the doctrine of laches.⁹ Finally, RCN notes that it currently has no channel space to accommodate WPXB on its Boston system and that reconfiguring its basic service tier would impose substantial per subscriber costs.¹⁰

5. In reply, Paxson states that the fact that WPXB does not provide a good quality signal at the RCN headend does not disqualify it from carriage when Paxson agrees to be responsible for the costs of providing such a signal.¹¹ Paxson also asserts that RCN fails to provide any legal support for its position that the complaint should be dismissed because of the doctrine of laches and argues that the only delay in this proceeding occurred as a result of the two motions for extension of time for RCN to file its answer.¹²

6. We find that WPXB qualifies for carriage on the RCN Boston, Massachusetts cable systems. First, WPXB meets the requirement of Section 76.55(e) of the Commission's rules that commercial television broadcast stations be located in the same DMA as the cable system on which they

³ Complaint at 2.

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.* at 4.

⁷ The first motion was filed on February 27, 2001 by RCN with Paxson's consent. The second joint motion was filed on March 16, 2001 and requested an indefinite extension of time with the parties representing that they would inform the Commission of the status of their discussions.

⁸ Answer at 4. RCN offers the results of these tests (Brio Engineering Report) as Exhibit 3 to its Answer.

⁹ *Id.* at 6.

¹⁰ *Id.*

¹¹ Reply at 3.

¹² *Id.* at 4.

seek carriage. Second, RCN has not met its initial burden to show that WPXB does not provide an adequate signal at the cable system's headend because its engineering report fails to meet Commission standards. We also find that, even if RCN's engineering report were acceptable, because Paxson agrees to pay for the cost of adequate signal delivery, it qualifies for carriage on the RCN system.

7. Although the Brio Engineering Report submitted by RCN attempts to show that WPXB's signal is inadequate, our review of that report shows that its conclusions are not based on good engineering practices. The Communications Act establishes a standard for signal availability for UHF commercial television stations of -45 dBm.¹³ When test results are less than -51 dBm, we require at least four readings over a two-hour period. In addition, signal strength surveys should include the following: 1) the specific make and model numbers of the equipment used and its age and most recent date of calibration; 2) a description of the characteristics of the equipment used including antenna ranges and radiation patterns; 3) the height of the antenna above ground level and a statement that the antenna was properly oriented; and 4) weather conditions and time of day the tests were performed.¹⁴

8. In this case, the Brio engineering report failed to meet Commission standards in several ways. First, based on the initial measured WPXB signal strength of -64 dBm, an acceptable test would measure at least four signal strengths over a two hour period, not five measurements over a 30 minute period as the Brio Engineering report indicates. Second, the report does not contain the age or the antenna radiation pattern for the antenna used in the tests and the antenna characteristics and gain data are unreadable in the copy submitted to the Commission. Third, the report does not give the age or date of the most recent manufacturer calibration for the spectrum analyzer used for the tests. Finally, the exhibit describing local weather conditions at the time of the tests is unreadable in the copy submitted to the Commission.

9. In addition, because the station has agreed to cover the expense of installing special equipment to assure delivery of a good quality signal, a cable operator cannot refuse to carry a station that agrees to cover any costs associated with adequate signal delivery.¹⁵ Because WPXB has committed to paying for any necessary special equipment in the event RCN can demonstrate that its signal is inadequate, we find WPXB is a station qualified for must carry status.¹⁶ WPXB's complaint is granted, conditioned on its delivering a good quality signal to RCN's principal headend. Although RCN notes that, if it is required to carry WPXB, it will have to reconfigure its basic service tier at substantial per subscriber costs, it does not offer any specific information regarding this claim. Therefore, we have no way to judge its accuracy or merit.

¹³ 47 U.S.C. §534 (h)(1)(B)(iii).

¹⁴ *Maranatha Broadcasting Co. Inc., Licensee of WFMZ-TV, Allentown Pennsylvania v. Harron Communications Corp.*, 11 FCC Rcd 10409, 10413-4 (CSB1996) (*Marantha*). See also *Paxson San Jose License Inc. v. Century Cable of Northern California Inc.*, 11 FCC Rcd 4796 (CSB1996).

¹⁵ 47 U.S.C. §534(h)(1)(B)(iii); see also *Marantha*, 11 FCC Rcd at 10414.

¹⁶ RCN's request for dismissal and for reimbursement of attorney's fees based on the doctrine of laches is without merit. RCN itself filed both extension of time requests and benefited from the additional time to file its answer. Further, when it became clear that a settlement would not be reached, WPXB requested a resumption of the pleading cycle within a reasonable time period.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. §534, that the must carry complaint filed by Paxson Boston License Inc., licensee of television broadcast station WPXB against RCN-BECOCOM, LLC **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that RCN **SHALL COMMENCE CARRIAGE** of the signal of WPXB within sixty (60) days from the date that WPXB provides a good quality signal at RCN's principal headend serving the Boston, Massachusetts area.

12. This action is taken pursuant to authority delegated by section 0.283, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

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